Supreme Court, U.S.
FILED
02 546 SEP 23 2002
OFFICE OF THE CLERK

(1)

No.

In the

Supreme Court of the United States

PAMELA M. ERWIN,

Petitioner,

v.

FEDERAL METALS CREDIT UNION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Gregory J. Christensen
Counsel of Record
730 SW Fourth Street
P. O. Box 2039
Corvallis, OR 97339
(541) 757-1229
Attorney for Petitioner

63 pp

QUESTION PRESENTED

BANKRUPTCY PROCEDURE AND STANDING: DEBTOR ENFORCEMENT OF A VIOLATION OF THE AUTOMATIC STAY AGAINST ABANDONED ESTATE PROPERTY.

The pre-petition earnings of an individual Chapter 7 debtor (petitioner) were garnished post-petition by a credit union (respondent) in spite of actual notice of the bankruptcy. The credit union did not return this property, nor did it seek annulment of the stay. The bankruptcy trustee did not pursue enforcement of the automatic stay. The debtor did. This case poses the following question:

> If a creditor willfully violates the automatic stay by seizing property of the bankruptcy estate (debtor's pre-petition earnings), but the trustee decides not to pursue the violation, can the debtor herself then recover this property by prosecuting an action for the violation of the automatic stay against the wrongdoer under 11 USC §362(h)?

PARTIES TO THE PROCEEDING

All parties are listed in the caption of this Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING.....ii
TABLE OF CONTENTS.....iii
TABLE OF AUTHORITIES.....iv
OPINIONS BELOW.....1
JURISDICTION.....2
RELEVANT STATUTORY PROVISIONS..... 3
STATEMENT OF THE CASE.....10
REASONS FOR GRANTING WRIT.....17
CONCLUSION.....37

APPENDIX

OPINIONS BELOW
CIRCUIT COURT OPINION.....1a
DISTRICT COURT OPINION.....3a
BANKRUPTCY COURT DECISION (Transcription).....8a
CIRCUIT COURT ORDER DENYING REHEARING.....1a
DEBTOR'S SCHEDULE "I" CURRENT EARNINGS.....13a
DEBTOR'S STATEMENT OF FINANCIAL AFFAIRS.....15a
DEBTOR'S COMPLAINT.....17a

TABLE OF AUTHORITIES

CASES

Barnhill v. Johnson, 503 U.S. 393, 118 L. Ed. 2d 39, 112 S. Ct. 1386 (1992)..... 11
Brown vs. O'Keefe, 300 US 598, 602, 57 S. Ct. 543, 546, 81 L. Ed. 827, 832 (1937)..... 18
Cusano v. Klein, 264 F. 3d 936 (9th Cir. 2001)..... 15
Hutchins v. IRS, 67 F. 3d 40 (3rd Cir 1995)..... 23
In Matter of Cudaback, 22 B. R. 914 (Bkrtcy. D. Neb. 1982)..... 36
In re Baker, 217 B.R. 609 (Bkrtcy. N. D. Cal. 1979)... 36
In re Baum, 15 B.R. 538 (Bkrtcy. E.D. Va. 1981)..... 36
In Re Carlsen, 63 B.R. 706 (Bkrtcy. C.D. Ca., 1986)... 34
In Re Chateaugay Corp., 920 F. 2d 183 (2nd Cir. 1990)..... 16
In Re Covington, 256 B. R. 463, 466 (Bankr. D. S. C. 2000)..... 11
In re Dennis, 17 B.R. 558 (Bkrtcy. M.D. Ga. 1982)... 36
In re Elder, 12 B. R. 491 (Bkrtcy. M. D. Ga. 1981)..... 35
In Re First Republic Bank Corp., 113 B. R. 277 (Bankr. N.D. Tex. 1989)..... 16
In re Gilpin, 209 B. R. 490 (Bkrtcy. W. D. Mo. 1997)..... 36
In Re Johnston, 49 F. 3d 538 (9th Cir. 1995)..... 18
In re O'Connor, 42 B. R. 390, 392 (Bkrtcy. E.D. Ark. 1984)..... 35
In Re Pace, 67 F. 3d 187 (9th Cir. 1995).....16, 26
In Re. Sills, 126 B. R. 974 (Bankr. S. D. Ohio 1991)..... 17
Jove Engineering, Inc. v. I. R. S., 92 F. 3d 1539 (11th Cir. 1996).....16, 29
Local Loan Co. v. Hunt, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1937)..... 36
Moneymaker v. CoBen (In Re Eisen), 31 F. 3d 1447 (9th Cir. 1994)..... 26

Price v. Rochford, 947 F. 2d 829
(7th Cir. 1991)..... 27
Rosenblum v. Dingfielder, 111 F. 2d. 406
(2d Cir. 1940)..... 18
Soares v. Brockton Credit Union, 107 F. 3rd 969
(1st Cir. 1997)..... 28
Sparhawk v. Yerkes, 142 U.S. 1, 12 S.Ct. 104,
35 L.Ed. 915 (1891)..... 18
U. S. v. Midway Industrial Contractors, Inc.,
178 B. R. 734 (N. D. Ill. 1995)..... 16
Wallace v. Lawrence Warehouse Co. 338 F. 2d 392
(9th Cir. 1964)..... 18

FEDERAL STATUTES

11 U.S.C. § 105.....3, 27, 28, 29
11 U.S.C. § 362.....1, 3, 13, 15,16,
19-23, 26-31, 33, 34, 37
11 U.S.C. § 521.....5
11 U.S.C. § 522..... 5, 29
11 U.S.C. § 541..... 5, 20, 29
11 U.S.C. § 554.....2, 6,14-17, 19, 21, 29, 34
28 U.S.C. §157..... 2
28 U.S.C. §1254..... 2
28 U.S.C. §1334..... 2

OREGON STATUTES

ORS 29.205(7).....7, 11

FEDERAL RULES

Bankruptcy Rule 1007.....8, 20
Bankruptcy Rule 4003.....9, 29
Bankruptcy Rule 7001.....1

OTHER

5 Collier on Bankruptcy ¶521.06(3)(a) (15th rev. ed. 2002)..20
H.R. Rep.No. 95-595, 95th Cong., 1st Sess. 340 (1977).....27

No.

In the

Supreme Court of the United States

PAMELA M. ERWIN,

Petitioner,

v.

FEDERAL METALS CREDIT UNION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Pamela M. Erwin, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 20, 2002.

OPINIONS BELOW

None of the lower courts' opinions are reported. They are printed in the Appendix.

This bankruptcy adversary proceeding was commenced by an individual debtor pursuant to Bankruptcy Rule 7001 to enforce the provisions of 11 U. S. C. §362 (a) – the automatic stay - against a credit union for garnishing the debtor's pre-petition earnings. The proceeding was brought in the United States Bankruptcy Court for the District of Oregon

(Eugene). Jurisdiction of the bankruptcy court is based on 28 U. S. C. §1334 and 28 U. S. C. § 157.

The bankruptcy court ruled from the bench *sua sponte* that the debtor lacked standing because the debtor's earnings at the time of the garnishment could only have been property of the bankruptcy estate, so that debtor herself was not damaged. The transcription of the bankruptcy court's ruling is set out in the Appendix, at page 8a.

The district court, in affirming the decision of the bankruptcy court, concluded that the debtor's pre-petition earnings *were* property of the bankruptcy estate, but that the stay violation had not been listed in debtor's bankruptcy schedules. Therefore, the district court held that the claim against the credit union for the recovery of debtor's pre-petition earnings did not revert back to the debtor through abandonment pursuant to 11 U. S. C. §554 (c), but remained property of the estate under 11 U. S. C. §554 (d). The district court opinion is set out in the Appendix, at page 3a.

The circuit court affirmed the district court in a memorandum opinion. The circuit court opinion is set out in the Appendix, page 1a.

JURISDICTION

The judgment of the court of appeals for the Ninth Circuit was entered on May 20, 2002. A timely petition for rehearing to the panel was denied on June 26, 2002, and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

RELEVANT STATUTORY PROVISIONS INVOLVED

FEDERAL STATUTES

11 U.S.C. § 105(a) Power of Court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 362(a), (d), (h) Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before

the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

* * * * *

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay and provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

* * * * *

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive

damages.

11 U.S.C. § 521(1) Debtor's duties. The debtor shall-

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

11 U.S.C. § 522(a)(l) Exemptions.

(l) The debtor shall file a list of property that the debtor claims as exempt under subsection (b) of this section. If the debtor does not file such a list, a dependent of the debtor may file such a list, or may claim property as exempt from property of the estate on behalf of the debtor. Unless a party in interest objects, the property claimed as exempt on such list is exempt.

11 U.S.C. § 541(a)(1), (3)-(7) Property of the Estate

(a) The commencement of a case under section 301, 302, 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * * * *

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by request, devise or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory of final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.
Any interest in property that the estate acquires after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

11 U.S.C. § 554 Abandonment of property by the estate.

(a) After notice and a hearing , the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
(b) On request of a party in interest and after notice and a hearing, the court may order the trustee to

abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

(c) Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

(d) Unless the court orders otherwise, property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate.

STATE STATUTES

Oregon Revised Statutes (1999) Chapter 29
Provisional Process; Attachment, and Garnishment

* * * * *

ORS 29.205(7) Notwithstanding any other provision of this chapter, if a garnishee discovers that a voluntary or involuntary bankruptcy petition has been filed by or on behalf of the defendant under section 301, 302 or 303 or the United States Bankruptcy Code (11 U.S.C. 101 to 1330) before the garnishee delivers garnishee's certificate pursuant to ORS 29.235, the garnishment of any property of the defendant in the garnishee's possession, control or custody is stayed pursuant to section 362 of the United States Bankruptcy Code (11 U.S.C. 362).

BANKRUPTCY RULES

Rule 1007(b), (c), (h)
Lists, Schedules and Statement; Time Limits

* * * * *

(b) Schedules and Statements Required.
Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms.

* * * * *

(c) Time Limits. The schedules and statements, other than the statement of intention, shall be filed with the petition in a voluntary case . . .

* * * * *

(h) Interests Acquired or Arising After Petition. If, as provided by § 541 (a)(5) of the Code, the debtor acquires or becomes entitled to acquire any interest in property, the debtor shall within 10 days after the information comes to the debtor's knowledge or within such further time the court may allow, file a supplemental schedule in the chapter 7 liquidation case, chapter 11 reorganization case, chapter 12 family farmer's debt adjustment case, or chapter 13 individual debt adjustment case. If any of the property required to be reported under this subdivision is claimed by the debtor as exempt, the debtor shall claim the exemptions in the supplemental schedule. The duty to file a supplemental schedule in accordance with this subdivision continues notwithstanding the closing of the case . . .

Rule 4003(b) Exemptions

(b) Objecting to a Claim of Exemptions. A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.

STATEMENT OF THE CASE

THE VIOLATION

After repossessing the debtor's automobile, the credit union (respondent) obtained a deficiency judgment against debtor in the Circuit Court of Oregon for Benton County on June 14, 1999, for nearly $10,000. The credit union served a writ of continuing wage garnishment on debtor's employer, Good Samaritan Hospital (the "hospital"), in Corvallis, Oregon, on June 22, 1999. The credit union garnished debtor's July 9 paycheck, collecting the sum of $163.35. The debtor sought bankruptcy protection.

Debtor's bankruptcy petition, schedules and statement of financial affairs were filed on July 20, 1999. The debtor's current earnings were listed in Schedule "I," (Appendix, p. 13a) and the car repossession and state court garnishment were listed in the Statement of Financial Affairs (Appendix, p. 15a).

The next morning, July 22, 1999, debtor's attorney faxed letters to the hospital and to the credit union's attorneys providing notification of debtor's bankruptcy filing. The credit union was requested to stop any garnishment of debtor's next paycheck.

Later that day, a paralegal in the office of the credit union's attorneys advised the hospital that the garnishment remained in effect to garnish the debtor's pre-petition wages.

The hospital withheld the garnishment of debtor's pre-petition wages from debtor's July 23 paycheck. The hospital mailed the garnishment check to

the credit union's attorneys on July 26, 1999. The credit union's attorneys endorsed the hospital's check to the credit union and mailed the check to the credit union on August 10, 1999, some 21 days after the debtor's bankruptcy case was filed.[1]

The facts surrounding the violation are undisputed and are set out at length in the district's court opinion (Appendix, p. 4a). The operative facts are:

1. The debtor provided actual notice of her bankruptcy filing promptly to the credit union.[2]

2. After notice of the bankruptcy filing, the credit union took affirmative action to collect debtor's pre-petition wages.

3. The credit union refused to return the garnished funds to the trustee, the debtor or the hospital, and sought no relief from the automatic stay.

4. Chapter 29, Oregon Revised Statutes, which contains provisions for wage garnishments, contains its own automatic stay.[3]

---

[1] *Barnhill v. Johnson*, 503 U.S. 393, 118 L. Ed. 2d 39, 112 S. Ct. 1386 (1992).

[2] See, *In Re Covington*, 256 B. R. 463, 466 (Bankr. D. S. C. 2000) "Where actual notice of the bankruptcy case is proven, a violation of the stay is presumed. Once it is shown that the creditor received actual notice of the bankruptcy, the violation is willful."

[3] ORS 29.205(7) (1999 Ed.) stays garnishment proceedings and prohibits delivery of any property of the defendant in the garnishee's possession after discovery of the bankruptcy and prior to delivery of the garnishee's certificate. According to the

EVENTS IN DEBTOR'S BANKRUPTCY CASE

At debtor's meeting of creditors on September 17, 1999, debtor advised her Chapter 7 trustee of the credit union's post-petition garnishment of her earnings. At the conclusion of the meeting, the trustee stated (1) that he would file a "no asset" report in debtor's case; (2) that the estate would not pursue recovery of the debtor's pre-petition wages seized post-petition, and (3) that the debtor was free to pursue the recovery of those wages. The credit union did not attend debtor's meeting of creditors.

The debtor thereafter made several requests upon the credit union's attorneys for a return her wages garnished on July 23, 1999, but without result. The credit union did not seek relief from or an annulment of the automatic stay pursuant to 11 USC §362(d).

The debtor was granted a discharge on November 19, 1999, and the debtor's bankruptcy case was closed that same day.

ADVERSARY PROCEEDING IN THE BANKRUPTCY COURT

Debtor commenced this adversary proceeding on October 22, 1999, (1) requesting that the credit union be found in contempt for violating the court's order imposing the automatic stay and (2) requesting damages, which included the debtor's pre-petition earnings, attorney fees, costs, and an award of punitive damages for willfully violating the automatic stay.[4]

---

paralegal, no certificate had been delivered by July 22, 1999. (Ex. Rec. p.16).

[4] See Appendix, "First Amended Complaint," p. 17a.

After completion of discovery, the debtor filed a motion for partial summary judgment seeking a determination that the credit union had willfully and contemptuously violated the automatic stay. Thereafter, the credit union filed a cross-motion for summary judgment arguing that neither the debtor nor the trustee had any interest in the pre-petition earnings that had been seized. It argued that the service of the writ of continuing garnishment on June 22, 1999, on the hospital, divested the debtor, and hence the trustee, from all interest in her future wages.

The bankruptcy court ruled from the bench *sua sponte*. The court held that the debtor's action was premised on 11 USC §362(h), which, it stated, requires that an individual must be injured by a willful violation of the automatic stay. The court stated the garnished earnings were either property of the credit union or of the bankruptcy estate when the earnings were garnished. Therefore, the debtor was not injured by any stay violation. The bankruptcy judge surmised in his ruling:

> " In no scenario, that I can imagine, would the debtor herself have been entitled to those funds. It follows that if there was a stay violation, she cannot be said to have been damaged by it . . . " (Appendix, p. 11a).

DISTRICT COURT APPEAL

Debtor filed an appeal of the bankruptcy court decision to the Bankruptcy Appellate Panel of the Ninth Circuit. The credit union timely opted out, and the appeal was heard by the district court. The parties filed briefs, but oral argument was not allowed.

The district found that debtor's garnished pre-petition earnings were property of the bankruptcy estate (Appendix, p. 5a). In affirming the bankruptcy court, the district court held that the debtor had not listed the claim against the credit union for violation of the automatic stay in her bankruptcy schedules. Although the stay violation occurred post-petition after her pre-petition wages had become estate property, the district court held that debtor's scheduling of the stay violation was essential for an abandonment of that claim to revert to the debtor under 11 U. S. C. §554(c).

The issue of scheduling the stay violation had not been raised or briefed by the parties. The district court concluded that the debtor's failure to list a claim against the credit union precluded standing:

> "Regardless, no claim against defendant (credit union) could revert to plaintiff (debtor). At the close of the bankruptcy proceeding, any claims that were scheduled by the debtor but not disposed of are deemed abandoned and revert to the debtor. 11 USC §554(c). Unscheduled claims remain property of the estate and under the trustee's control. [citations omitted]. Here, plaintiff scheduled no claim against defendant and no such claim could possibly revert to plaintiff, because at no time did plaintiff have a claim against defendant. Thus, any claim the estate had against defendant for violating the automatic stay provision was and remains the property of the estate." (Order, District Court, Appendix p. 6a) (parenthetical material added).

CIRCUIT COURT APPEAL

In a memorandum decision, a panel of the Ninth Circuit Court of Appeals affirmed the district court. The circuit court agreed that the claim against the credit union for the stay violation had not been scheduled by the debtor, so that the claim did not revert to the debtor under 11 U. S. C. §554(c). Therefore, the debtor lacked standing. However, in response to a Ninth Circuit case which had been decided during the pendency of this appeal, *Cusano v. Klein*, 264 F. 3d 936 (9th Cir. 2001),[5] the circuit court panel acknowledged that the debtor was not required to schedule the stay violation because, as a "general rule," a debtor has no duty to list a cause of action that accrues after the bankruptcy case is filed (See Appendix, n. 1, p. 2a).

In her petition for rehearing to the panel, the debtor argued that a claim for violation of the stay was not a separate asset that had to be listed by amendment to her schedules, but that 11 USC §362(h) simply provides a procedure by which an individual may recover, through damages and sanctions, property

---

[5] The debtor Cusano had been a member of the band, KISS. He had written two songs and had scheduled "song rights" with "unknown" value. After his bankruptcy case was closed, the debtor sued to recover unpaid royalties. The defendants raised judicial estoppel, alleging Cusano had not scheduled this cause of action in his bankruptcy case. The court held that because the song rights had been listed and had been abandoned, in part, through technical abandonment under 11 U. S. C. §554(c), the song rights reverted to Cusano, along with the right the songs' royalties that accrued post-petition. (DISCUSSION, I. Pre-Petition Compositions, pps. 945-948).

wrongfully seized in violation of the automatic stay. A violation of the stay does not create new property, it merely provides a method by which the debtor can recover her property that was wrongfully taken. A claim under §362(h) is no more than an accrual to a previously listed asset - her pre-petition earnings.[6] If it were not for debtor's earnings, there would not have been a garnishment, or a violation of the automatic stay or a §362(h) claim.

The debtor, also, pointed out that in the Ninth Circuit,[7] as is true in several other circuits,[8] trustees in bankruptcy and corporate entities lack standing under 11 U. S. C. §362(h). By its language, the statute limits claims to "individuals." Corporations and bankruptcy trustees, who are agents of estates, are not individuals. Therefore, the §362(h) claim could not have "vested" or "remain vested" in the bankruptcy estate. In fact, the §362(h) had always belonged to the *debtor*, not to the estate, and no reversion under §554(c) was required.

The Debtor's petition for rehearing was denied.

---

[6] See, 11 U.S.C. § 541(a)(6) and (7)

[7] *In Re Pace*, 67 F. 3d 187 (9th Cir. 1995) at p. 193 " ... we conclude that a Chapter 7 trustee is not an 'individual' for purposes of 11 U. S. C. § 362(h) ... " The court noted that 11 U. S. C. §105 was available to the court to assess damages.

[8] *Jove Engineering, Inc. v. I. R. S.*, 92 F. 3d 1539 (11th Cir. 1996); *In Re Chateaugay Corp.*, 920 F. 2d 183 (2nd Cir. 1990); *U. S. v. Midway Industrial Contractors, Inc.*, 178 B. R. 734 (N. D. Ill. 1995); *In Re First Republic Bank Corp.*, 113 B. R. 277 (Bankr. N.D. Tex. 1989).

REASONS FOR GRANTING WRIT

I. INNOVATIONS BY THE LOWER FEDERAL COURTS TO BANKRUPTCY PROCEDURE, ESPECIALLY AFFECTING THE AUTOMATIC STAY, SHOULD BE REVIEWED BY THIS COURT THROUGH EXERCISE OF ITS SUPERVISORY POWER OVER COURTS OF BANKRUPTCY.

OVERVIEW: Efficient bankruptcy administration depends upon the inviolability of the automatic stay. To this end, Congress intends that violations of the automatic stay be readily enforceable. The decisions of the three lower federal courts have altered federal bankruptcy procedure significantly in relationship to the enforceability of the automatic stay. Debtor's case is significant because large numbers of consumer debtors will be effected by these decisions.

BANKRUPTCY COURT DECISION: The bankruptcy court decision failed to recognize that 11 U. S. C. §554(c) caused the abandonment of debtor's pre-petition wages to be effective *nunc pro tunc* as of her petition date. 11 U. S. C. §554(c) is premised upon the doctrine of "relation back." Relation back is a pre-Code, equitable doctrine applied in bankruptcy. The legal effect is that ownership of debtor's pre-petition wages is deemed continuous, as if no bankruptcy had been filed.

"Relation back" has its roots in equity jurisprudence. When estate property is abandoned, the property ceases to be property of the bankruptcy estate and reverts to the debtor. *In Re. Sills,* 126 B. R. 974

(Bankr. S. D. Ohio 1991). See, also, *In Re Johnston*, 49 F. 3d 538 (9th Cir. 1995).

The doctrine of "relation back" has been long-applied in the bankruptcy context. *Sparhawk v. Yerkes*, 142 U.S. 1, 12 S.Ct. 104, 35 L.Ed. 915 (1891), cited in *Wallace v. Lawrence Warehouse Co.* 338 F. 2d 392, 395, n. 1 (9th Cir. 1964) ("when the trustee abandons property of the bankrupt, title reverts to the bankrupt, nunc pro tunc, so that he is treated as having owned it continuously.")

Justice Cardozo stated that upon abandonment by a trustee in bankruptcy, whatever title had passed to the trustee was extinguished "by relation as of the filing of the petition." *Brown vs. O'Keefe*, 300 US 598, 602, 57 S. Ct. 543, 546, 81 L. Ed. 827, 832 (1937).

Where the trustee does not prosecute a claim, the right to do so is viewed "not as having lapsed in favor of the wrongdoer, but as remaining in the bankrupt." *Rosenblum v. Dingfielder*, 111 F. 2d. 406 (2d Cir. 1940) at p. 409:

> "Relation back may be considered in the nature of a fiction ... , but after all, it is only a convenient way of describing a situation where the trustee never had occasion to proceed and the right is viewed not as having lapsed in favor of the claimed wrongdoer, but as remaining in the bankrupt." (citations omitted).

Here the bankruptcy judge based his decision on the premise that the debtor's pre-petition wages had to be vested in her at the moment the stay violation

occurred. The judge, without citation to any authority or precedent, concluded: "In no scenario, that I can imagine, would the debtor herself have been entitled to those funds. It follows that if there was a stay violation, she cannot be said to have been damaged by it ... " (Appendix, p. 11a)

The practical consequence of the bankruptcy court's decision is to preclude debtors from prosecuting actions under 11 U. S. C. §362(h) if the stay violation occurred at any time when the debtors' property was still in the bankruptcy estate. In most consumer cases, this means that stay violations that occur from the petition date to the closing date of the case, cannot be prosecuted by debtors. Trustees, as will be discussed below, in several circuits, including the Ninth Circuit, do not have standing to prosecute claims under §362(h). This decision erodes the viability of the automatic stay.

THE DISTRICT COURT DECISION: The district court, in affirming the lower court's decision, added the idea that because the stay violation had not been listed in the debtor's schedules, such cause of action could not revert to her under the abandonment mechanism contained in 11 U. S. C. §554(c). However, the court's reasoning begged two foundational questions.

Is there any authority in the Code or the Rules or case precedent that requires violations of the automatic stay, which always arise post-petition, to be listed in a debtor's schedules?

Secondly, is a violation of the automatic stay a distinct legal claim? Does a §362(h) claim exist without apart from to the underlying property interests injured by the violation?

Question One: *5 Collier on Bankruptcy* ¶521.06(3)(a) (15th ed. Rev. 2002) contains the following comment:

> "... the debtor has no duty to amend the schedules to list property the estate acquires as a result of actions taken with respect to previously scheduled assets ... The schedules require only a listing of property owned at the time the petition is filed, or property treated under section 541(a)(5) as if it were owned on that date. Otherwise, schedules would have to be amended almost daily."

The duty to list after-acquired property is limited by Rule 1007(h) to the property specified in 11 U. S. C. §541(5) - inheritances, divorce awards, and beneficiary of life insurance or death benefits. Without this provision, a debtor could immediately discharge his debts in bankruptcy in anticipation of receiving such property in the near future. However, after-acquired property that must be listed is limited to 11 U. S. C. §541(a)(5).

Rights under 11 U. S. C. §362(h) only arise post-petition. It is difficult to anticipate violations of the automatic stay. The debtor here did all she could to prevent a post-petition garnishment, but the violation occurred anyway.

In fact, the primary purpose of 11 U. S. C. §554(c) and (d) is not to prevent debtors from enforcing the automatic stay, but rather to prevent debtors from secreting a claim or cause of action in their bankruptcy cases and later enforcing such claims or causes other forums. These statutes merely apply the equitable doctrine of judicial estoppel to bankruptcy cases.[9] Debtors are prohibited from hiding or misrepresenting the value of a claim in bankruptcy, and later suing on that claim in a different court.

In bankruptcy cases involving automatic stay violations, the conditions under which judicial estoppel applies do not exist. Automatic stay violations are enforced in the bankruptcy court itself. There is only one forum and there is no occasion for a debtor to assume inconsistent legal positions. Everything that must be done to enforce a violation of the automatic stay is done in the light of day. The use of 11 U. S. C. §554(c) and (d) to preclude the valid and vital enforcement of stay violations erodes the power of the automatic stay.

Question Two: 11 U. S. C. §362(h) provides nothing more than a method for reimbursing the individual debtor for her expenses incurred in recovering her pre-petition property that was taken in violation of the automatic stay. Neither she, nor even trustee in bankruptcy, would be entitled to obtain a net

---

[9] See, Jay L. Gottlieb & Brian E. Greer, *The Doctrines of Standing and Judicial Estoppel: How Actions or Omissions in Bankruptcy Procedings May Preclude the Assertion of Claims by a Debtor in a Subsequent Action*, 9 J. Bankr, L. & Prac. 487 (July-August 2000).

benefit larger than the return of the property taken. Any other portion of the award simply goes to pay the costs of litigation. These litigation costs, however, are paid by the violator as a sanction, and, it is in this *mandatory* sanction against the violator that the deterrent effect of 11 U. S. C. §362(h) is realized. In an aggravated case, the violator could be sanctioned with the penalty of punitive damages, but the purpose of punitive damages is to punish the wrongdoer, and set an example to would-be violators of the stay.

A §362(h) claim cannot exist unless there has been damage to an underlying property interest. The damage to the property interest attaches to the property, just like a claim for fire damage to a house, or body damage to a car or conversion of a cow. The damage claim is brought by the owner of the underlying property. It has no life apart from that property. This being so, the claim against the credit union for the violation of the automatic stay attached to the debtor's pre-petition earnings. As such, it was scheduled as part and parcel of her pre-petition earnings and, along with her wages, it descended to the debtor through abandonment.

The claim to recover debtor's wages is part of her wages. Framing the case into a syllogism, or a riddle:

1. A debtor was owed wages when she filed her case.
2. Those wages became property of her bankruptcy estate.
3. Those wages reverted to her through abandonment when her case closed.

4. During the pendency of her case a creditor took her pre-petition wages.
5. The debtor is prohibited by the court in which her case was pending from acting to recover her wages.
6. Describe what reverted to the debtor when her case closed.

There is a circularity in the logic of the lower courts' decisions. This is quite evident when the district court attempted to blend its reasoning with the bankruptcy court's decision: "Here, plaintiff scheduled no claim against defendant and no such claim could possibly revert to plaintiff, because at no time did plaintiff have a claim against defendant." (Order, District Court, Appendix p. 6a) One must view the pre-petition earnings and the claim under §362(h) as a single asset.

The case of *Hutchins v. IRS*, 67 F. 3d 40 (3rd Cir 1995) discusses this situation in detail. In that case the debtor had scheduled an antitrust action as an asset. The case was settled for $243,000 and the antitrust defendants forgave $76,000 in debt. The trustee filed an estate tax return and included the retired debt as taxable income. The trustee made distribution on the claims, and abandoned all remaining property to the debtor. Later, the debtor reviewed the estate tax return and, thinking the retired debt should not have been included as taxable income, filed an amended return with the result that the IRS granted a refund in the amount requested ($38,458) except for $650.00.

The debtor filed suit for the $650.00 and the IRS asserted that the debtor did not have standing because the claim to the tax refund had not been listed in the debtor's bankruptcy schedules. The IRS requested the court to rescind that previous refund. The IRS argued, as do the three lower courts here, that the refund was still estate property because the refund had not been listed in the debtor's bankruptcy schedules, so that only the estate could claim the refund.

The court held that the tax refund was not a known asset at the time of the bankruptcy and so could not be scheduled. The court stated:

> "Our review of these arguments indicates that the tax refund was properly scheduled to the extent that it could be. Hutchins scheduled the only asset of which he was aware, the antitrust claim. The tax refund arose later as a result of the actions of the trustee. Hutchins did not cause the trustee to file an erroneous tax return. And he had no reason to suspect its existence .... "
>
> Hutchins then received the right to this tax claim as an undifferentiated part of the antitrust claim he acquired through abandonment." (p. 45).

The single difference between this case and *Hutchins* is that the debtor here took affirmative action to prevent a "mistake" from happening - a violation of the automatic stay. She notified the only two parties

that had the legal power to stop the garnishment - the hospital and the credit union - of her bankruptcy filing.

There is no provision in the Code, no requirement in the Bankruptcy Rules and no case law that remotely suggests a debtor should list a violation of the automatic stay in her schedules. If Congress thought such a requirement necessary, Congress could have enacted it into the Bankruptcy Code. If this court thought it was necessary, this court could have promulgated a bankruptcy rule to that effect. However, lower federal courts do not have authority to legislate or to make new bankruptcy rules. Nonetheless, that is precisely what the district court did - promulgated a new bankruptcy rule. The rule precludes debtors from enforcing violations of the automatic stay, and this erodes the stay's vitality.

CIRCUIT COURT DECISION: The circuit court opinion was brief. However, in two foot notes, the court indicated its reasoning.

> "[1]We do not imply that the property should have been scheduled; we merely note that it was not ... " (Appendix, p. 2a, n. 1)

In the context of this case, the court's statement is a *non sequitur*. The court's *holding* was that the debtor *forfeited* her right to enforce a stay violation and recover her pre-petition wages because the violation had not been scheduled. However, if the violation was not required to be scheduled, if the debtor was not under any duty to schedule the violation, how could she

forfeit her right to enforce the violation? Legal logic dictates that if the debtor had no duty to perform an act, she cannot not lose a right for failing to do that act. Either she had a duty to schedule the post-petition stay violation or she did not. An individual does not lose a right, unless she firsts violates a duty.

> "[3] *Moneymaker v. CoBen (In Re Eisen)* ... (stating the rule that the bankruptcy trustee, as the representative of the bankruptcy estate is the 'only party with standing' to prosecute causes of action belonging to the estate)" (Appendix, p. 2a, n. 3)

In the context of prosecuting a claim under §362(h), the Ninth Circuit long ago ruled that such claims do not belong to the estate and cannot be prosecuted by a trustee in bankruptcy. *In Re Pace*, 67 F. 3d 187 (9th Cir. 1995). *Moneymaker* is off point.

THE VITALITY OF THE AUTOMATIC STAY: The United States Bankruptcy Reform Act of 1978 has arguably become the most potent civil code in the nation. The Code has widespread impact on national life with more of the population participating in bankruptcy cases each year, as debtors or creditors, than in any other type of legal proceeding.

Over 5,000,000 bankruptcy petitions were filed from 1998 through 2001. Of this number, more than 95% were consumer cases. The overwhelming majority of these consumer cases were "no asset" cases.

The automatic stay, 11 USC §362(a), is the central provision of the United States Bankruptcy Reform Act of 1978 . *Price v. Rochford*, 947 F. 2d 829 (7th Cir. 1991). The automatic stay is the linchpin upon which all protections afforded debtors and upon which the orderly administration of all bankruptcy cases hang:

> "The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drive him into bankruptcy." H. R. Rep. No. 95-595, 95th Cong., 1st Sess. 340 (1977).

A violation of the automatic stay is a violation of an order of the bankruptcy court and can subject the violator to contempt sanctions under 11 U. S. C. §105.

Prior to 1984, the sole method for prosecuting violations of the automatic stay was to invoke the court's equitable powers under 11 U. S. C. § 105 and hold the creditor in contempt.

Congress added 11 U. S. C. §362(h) as a provision in The Bankruptcy Amendments and Federal Judgeship Act of 1984. This provision allowed an individual who was damaged by a willful violation of the automatic stay to recover actual damages, costs, attorney fees, and even punitive damages. As contrasted with enforcement under § 105, upon a showing of willfulness, an award of damages under 11 U. S. C. §362(h) is mandatory, not discretionary.

Congress, by adding this new provision to the automatic stay in 1984, strengthened the formidability of the automatic stay and sent a clear message to creditors that willful violations of the stay, even small ones, would not be tolerated.

The smooth and successful administration of the huge volume of bankruptcy cases each year depends upon all creditors respecting and complying with the automatic stay. Without universal compliance, the bankruptcy system could not handle its enormous caseload. Bankruptcy courts are, or certainly should be, jealous to guard against violations of the stay. *Soares v. Brockton Credit Union*, 107 F. 3rd 969 (1st Cir. 1997), 975-976:

> "In order to secure these important protections, courts must display a certain rigor in reacting to violations of the automatic stay."

THE EMASCIATION OF 11 U. S. C. §362(h). Under 11 U. S. C. §541(a), all of the debtor's property becomes property of the bankruptcy estate as of the commencement of the case, and will remain so exclusively for several weeks. The soonest that claimed exemptions become final is 30 days after the meeting of creditors (11 U. S. C. §522[l] and Rule 4003). Formal abandonment under 11 U. S. C. §554(a) and (b) requires notice and a hearing.

Therefore, at the beginning of a bankruptcy case and for several weeks thereafter, all of debtor's property is vested in the bankruptcy estate. Unfortunately, most stay violations will occur within this time period. When a bankruptcy case is filed, foreclosure sales, repossessions and garnishments are already in motion. Aggressive creditors are not prone to patience. The writ of garnishment has already been served, the repossession man has already been hired, and the date of the foreclosure sale has already been set and published.

Therefore, most stay violations resulting from foreclosures, repossessions and garnishments involve property of the estate exclusively. In light of the lower courts' rulings, how can the inviolability of the automatic stay to be maintained?

The bankruptcy court, though invited, would not use its power under 11 U. S. C. §105 to enforce the stay.[10] Furthermore, it nullified the doctrine of relation

---

[10] *Jove Engineering, Inc. v. I. R. S.*, 92 F. 3d 1539, 1557 (11th Cir. 1996) "The district court abused its discretion by not finding the IRS in

back by excluding abandoned property from the application of 11 U. S. C. §362(h), holding that the garnished funds must belong to the debtor at that instant in time when the garnishment occurs. The practical result of the bankruptcy court's ruling is to make 11 U. S. C. §362(h) a nullity.

The bankruptcy court's ruling opens the door to creditors to commit violations of the stay with impunity for there is no one left to enforce the stay. The mischief is more than apparent if this case is multiplied by several thousand garnishment cases.

The ruling effects property interests other than just wage garnishments. By way of illustration, suppose a debtor files a bankruptcy two days before the sale date under a trust deed foreclosure. The debtor has substantial equity in her home, but not in excess of the applicable homestead exemption. Although it is claimed exempt, the debtor's home is estate property as of the commencement of the case and will remain so until some 30 days after the meeting of creditors. However, the trust deed sale is conducted in spite of the automatic stay and the debtor's house is sold.

The trustee will have no basis whatever for pursuing any recovery for there is no equity in the property for the estate. He is barred in any event as a trustee from making a claim under §362(h). The debtor

---

contempt under §105 for willfully violating the automatic stay." The IRS willfully violated the automatic stay because it knew the automatic stay was in effect and intended the actions which violated the stay.

cannot make a claim because the home was estate property when it was sold and so she was not damaged, according to the lower courts' reasoning, and has no standing to enforce the automatic stay.

Debtor's case is a garden variety §362(h) claim. Her case is exactly what Congress had in mind when it enacted 11 U. S. C. §362(h) - a small dollar violation which the bankruptcy estate had no interest in pursuing. The lower courts' here have turned that statute on its head, thwarting the intent of Congress and dangerously eroding the force and integrity of the automatic stay.

A BIGGER PROBLEM IN THE END: At the commencement of the debtor's adversary proceeding, the only issue was whether the credit union had willfully violated the automatic stay. However, the three lower courts have not yet addressed that legal issue. Without any invitation from the parties, the three lower courts have taken an excursion out of the region of settled bankruptcy law into uncharted territory.

If this case was confined to only an aberrant refusal to enforce 11 U. S. C. §362(h), there would be no reason to seek review by this court. However, in the end, these are three decisions that erode the vitality of the automatic stay to such a degree that creditors are encouraged to duplicate many times over the actions of the credit union in this case.

The petitioner's case is important not because it presents a unique factual situation, nor because a great deal of money is at stake. The opposite is true.

Significance exists because tens of thousands, perhaps hundreds of thousands, of bankruptcy debtors each year are in identical situations:

a. Due to a pending or threatened garnishment of earnings, these debtors suffer under severe financial distress, uncertain how or unable to pay monthly living expenses.

b. Each garnishment may only involve a few hundred dollars or less - 10% to 25% of their net take-home. Yet, it is enough to make the difference between meeting living expenses each month and not.

c. These debtors file petitions seeking protection of the bankruptcy court to stop the garnishments.

d. These debtors all have jobs, and virtually all have pre-petition earnings owed to them that become property of their bankruptcy estates.

The door has been opened for this credit union to repeat its actions with impunity. The door has been opened to other credit unions and other financial institutions to do the same. In fact, any judgment creditor can now garnish a debtor's pre-petition wages after learning of the bankruptcy filing and the debtor can do nothing about it.

The trip has taken the case and the courts far afield. Every reported case involving post-petition

garnishments of debtors' pre-petition wages have found without hesitation that the creditor committed a violation of the automatic stay.

The decisions rendered by the three courts in this case appear to have the following adverse effects:

1. The bankruptcy court decision has left an entire class of stay violations without a remedy (small violations which occur early in the case when all of the debtor's property is exclusively property of the bankruptcy estate). Debtors cannot show damage under the bankruptcy court's analysis since all of their property has become estate property. The decision has nullified the intent of Congress in enacting 11 U. S. C. §362(h).

2. The district court and circuit court have formulated a new bankruptcy rule of procedure: stay violations, to be enforceable, must be listed in a debtor's bankruptcy schedules. Although this requirement is not found in the Code or in the Bankruptcy Rules, nor in any reported bankruptcy case, a debtor in the Ninth Circuit should now amend her schedules to list all stay violations that occur during the pendency of her case.

II. THE HOLDING OF THE CIRCUIT COURT IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AND WITH DECISIONS IN ITS OWN CIRCUIT

As stated in the previous section, these three lower courts have departed from accepted bankruptcy practice and settled bankruptcy law. As a result, these decisions conflict with other circuits, as well the as the Ninth Circuit itself.

All reported cases in which a creditor has garnished the pre-petition wages of a debtor after the filing of bankruptcy have straight forwardly found a violation of the automatic stay. These cases do not analyze a debtor's legal standing to prosecute violations under 11 U. S. C. §362(h) or 11 U. S. C. §554(c). The debtor's standing to recover her own wages was not an issue in these cases. The dearth of such analysis is not to be explained by inattentiveness of these courts or the parties involved, but by the well-settled and universal acknowledgement of these courts that debtors have standing under 11 U. S. C. §362(h) in garnishment cases. It is almost self-evident under the automatic stay that creditors must stop wage garnishments when a debtor files a bankruptcy case.

These cases are set out below and briefly described:

In Re Carlsen, 63 B.R. 706 (Bkrtcy. C.D. Ca., 1986) was the leading case in the Ninth Circuit on wage garnishment. Also, it is factually identical to this case. In *Carlsen*, the IRS had notice of the bankruptcy, but waited to release its levy until it received the debtor's pre-petition earnings. It argued that its levy divested

the debtor from all ownership interest in the debtor's future wages. The court responded:

> "It is an absurd argument under California law that the service of the notice of levy on wages deprives the debtor herein of all legal or equitable interest in the wages." at page 709 (emphasis in the original).

The court, also, found that the IRS had a duty to turnover the property it had seized:

> " ... the IRS had the choice of returning the check to the County, for it had received it in violation of the automatic stay, or turning the money over to the trustee as property of the estate. The failure of the IRS to take either of these actions is in violation of the automatic stay and of the turnover requirements of the Bankruptcy Code." Pps. 710-711.

See, *In re Elder*, 12 B. R. 491 (Bkrtcy. M. D. Ga. 1981) The debtor should make certain that all entities involved know about the bankruptcy. The creditor must stop the "downhill snowballing" of a continuing garnishment.

In re O'Connor, 42 B. R. 390, 392 (Bkrtcy. E.D. Ark. 1984):

> "The Court cannot envision a more obvious example of an act to collect or recover a claim against the property of the debtor than issuance of a garnishment ... at whatever stage the garnishment is, the creditor's attorney must do everything he can to halt the proceeding."

In Matter of Cudaback, 22 B. R. 914 (Bkrtcy. D. Neb. 1982) Wages held by the debtor's employer on the petition date, which were subject to a pre-petition levy, were property of the estate.

In re Gilpin, 209 B. R. 490 (Bkrtcy. W. D. Mo. 1997) A garnishment lien terminated upon imposition of the automatic stay because permitting a creditor to continue to enforce a discharged debt would destroy the debtor's fresh start.

In re Dennis, 17 B.R. 558 (Bkrtcy. M.D. Ga. 1982) When learning of the bankruptcy, the creditor had an affirmative duty to dismiss the garnishment proceeding.

See, also, *In re Baker*, 217 B.R. 609 (Bkrtcy. N. D. Cal. 1979); *In re Baum*, 15 B.R. 538 (Bkrtcy. E.D. Va. 1981); and *Local Loan Co. v. Hunt*, 292 U. S. 234, 54 S. Ct. 695, 78 L. Ed. 1230 (1937).

CONCLUSION

The debtor has long since recovered from the hardship of the post-petition garnishment of her wages in July, 1999. However, the decisions of the three lower courts present great concern. For those courts have allowed the stay violation in this case to go unpunished, but far more importantly, they have allow and encourage this credit union to continue, and other judgment creditors to begin, to commit violations of the automatic stay.

The circuit court decision dramatically confines 11 U. S. C. §362(h) in derogation of Congressional intent. The decision diminishes the formidability of the automatic stay. The circuit court has instituted a bankruptcy rule that requires amendments to debtors schedules. The circuit court decision conflicts with decisions of other circuits and its own.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

/s/ Gregory J. Christensen
Gregory J. Christensen
Counsel of Record
730 SW Fourth Street
P. O. Box 2039
Corvallis, OR 97339
(541) 757-1229
Attorney for Petitioner

No.

In the

Supreme Court of the United States

PAMELA M. ERWIN,

Petitioner,

v.

FEDERAL METALS CREDIT UNION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX

FILED
MAY 20 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: PAMELA M. ERWIN, Debtor, --- PAMELA M. ERWIN, Plaintiff - Appellant, v. FEDERAL METALS CREDIT UNION, Defendant - Appellee.	No: 01-35120 D.C. No. CV-00-06314-AA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted May 8, 2002
Portland, Oregon

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Before: TROTT and T. G. NELSON, Circuit Judges and SHADUR, ** District Judge.

Pamela M. Erwin appeals the district court's dismissal of her appeal and affirmance of the bankruptcy court's decision. We affirm. Assuming, for the purpose of this decision, that the wages in question were indeed the property of the estate, as Erwin argues, and not of the Credit Union, we nonetheless conclude that the property did not revert to Erwin and that she therefore lacks standing.

The estate did not formally abandon the property pursuant to 11 U.S.C. § 554(a), and Erwin never forced abandonment under 11 U.S.C. § 554(b). The property was not scheduled and thus did not revert to the debtor pursuant to 11 U.S.C. § 554(c).[1] Finally, the property was not administered. Accordingly, pursuant to 11 U.S.C. § 554(d), it remained property of the estate,[2] and Erwin lacks any interest in it sufficient to confer standing.[3] For the foregoing reasons, we affirm the decision of the district court.

AFFIRMED.

** The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

[1] We do not imply that the property should have been scheduled; we merely note that it was not. *Cf. Cusano v. Klein*, 264 F.3d 936, 947 (9th Cir. 2001) (noting that, as a general rule, "a debtor has no duty to schedule a cause of action that did not accrue prior to bankruptcy.").

[2] *See Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d. 705, 709 (9th Cir. 1986).

[3] *Moneymaker v. CoBen (In re Eisen)*, 31 F. 3d 1447, 1451 n.2 (9th Cir. 1994) (stating the rule that the bankruptcy trustee, as the representative of the bankruptcy estate, is "the only party with standing" to prosecute causes of action belonging to the estate) (internal quotation marks and citation omitted).

FILED
00 DEC 18 PM 2:21
CLERK, U.S. DISTRICT COURT
DISTRICT OF OREGON
EUGENE, OREGON
BY: SN

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: PAMELA M. ERWIN, Debtor.	Case no: 00-6314-AA (Adv. Pro. No: 99-06291-fra)
PAMELA M. ERWIN, Plaintiff, v. FEDERAL METALS CREDIT UNION, Defendant.	ORDER

AIKEN, Judge:

This case arises from a proceeding brought by plaintiff, a Chapter 7 debtor, against a judgment creditor for an alleged violation of the automatic stay under 11 U.S.C. § 362, after the creditor garnished pre-petition wages from a paycheck issued post-petition. Upon hearing, the Bankruptcy Court found that plaintiff could not assert a claim under §362, because the wages remained property of the estate and plaintiff did not have an interest in the wages.

Plaintiff now appeals from the order granting summary judgment in favor of defendant. The decision of the Bankruptcy Court is affirmed.

STANDARD

The bankruptcy court's findings of fact shall not be set aside unless clearly erroneous. Fed. R. Bankr. §8013. Issues of law reviewed *de novo*. U.S. v. Horowitz, 756 F. 2d 1400, 1403 (9th Cir. 1985).

FACTUAL BACKGROUND

Defendant obtained a judgment against plaintiff in Benton County Circuit Court on June 14, 1999. Defendant then served a writ of continuing garnishment on plaintiff's employer on June 22, 1999. Defendant received $163.35 from plaintiff's employer on or about July 9, 1999.

Plaintiff filed a Chapter 7 bankruptcy petition on July 20, 1999, in order to stop the continuing wage garnishment. On July 21, 1999, plaintiff's counsel faxed a letter to defendant and plaintiff's employer, notifying them of the bankruptcy filing and requesting release of the writ garnishment.

On July 21, the office of defendant's counsel called plaintiff's employer, notifying the employer of the bankruptcy filing and requesting discontinuance of the garnishment as of the filing date. However, counsel's office told the employer of its opinion that the garnishment remained effective with respect to plaintiff's pre-petition wages.

On July 23, 1999, plaintiff's employer issued paychecks for the pay period ending July 18, 1999. The employer withheld $330.73 from the plaintiff's paycheck and mailed it to counsel for defendant. The $330.73 represents pre-petition wages.

Defendant did not file a motion for relief from stay with respect to the funds at issue.

On September 22, 1999, the estate trustee filed an Inventory and Report of No Assets with the court. Thereafter, plaintiff demanded that defendant relinquish the $330.73. Defendant refused, and plaintiff filed suit.

The bankruptcy court found that the plaintiff could not establish that she was damaged by defendant's alleged violation of the automatic stay, because the funds in question remained the property of the estate and plaintiff could show no personal interest in the funds. Excerpt of record, pp 2-4. Accordingly, the bankruptcy court found that plaintiff had no standing to bring an action against the defendant and granted summary judgment in favor of defendant.

DISCUSSION

The issue presented in this appeal is whether the bankruptcy court correctly found that plaintiff could not establish damages resulting from defendant's alleged violation of the automatic stay under §362(h), because the disputed wages remained the property of the estate. I find that the bankruptcy court was correct.

Wages earned but not paid become property transferable to the estate once a petition is filed. 11 U.S.C. §541(a) (6). Here, plaintiff had earned the wages by July 18, 2000 (sic), but had not been paid when she filed her bankruptcy petition on July 20, 2000 (sic). Hence, plaintiff's wages for the pay period ending July 18, 2000 (sic), became the property of the estate as of July 20, 2000 (sic). It follows that any subsequent claim based on the alleged violation of

the automatic stay belonged to the estate, not to the plaintiff. Plaintiff cannot establish damages for the alleged violation of the automatic stay, because plaintiff had no interest in the garnished wages when the automatic stay applied.

Plaintiff argues that the estate trustee abandoned any claim against defendant at a creditors meeting and therefore she is entitled to bring an action against defendant to enforce the automatic stay provision. The bankruptcy court did not make any findings whether the trustee abandoned any claim. However, based on the bankruptcy court's finding that the wages at issues remained the property of the estate, it follows that the bankruptcy court found no abandonment. Further, abandonment of a claim requires notice and hearing. 11 U.S.C. §554(a), (b). Plaintiff provides no evidence that the trustee provided notice of an abandonment or that any hearing on abandonment occurred.

Regardless, no claim against defendant could revert to plaintiff. At the close of the bankruptcy proceeding, any claims that were scheduled by the debtor but not disposed of are deemed abandoned and revert to the debtor. 11 U.S.C. §554 (c). Unscheduled claims remain the property of the estate and under the trustee's control. Id. §554(d) ; Tyler House Apartments, Ltd. v. United States, 38 Fed.Cl. 1, 6 (1997) (citing Vreugdenhill v. Navistar Int'l Transp. Corp., 950 F.2nd 524 (8th Cir. 1991)). Here, plaintiff scheduled no claim against the defendant and no such claim could possible revert to plaintiff, because at no time did plaintiff have a claim against the defendant. Thus, any claim the estate had against the defendant for violating the automatic stay provision was and remains the property of the estate. Accordingly, plaintiff lacks standing to bring this suit.

CONCLUSION

The bankruptcy court's decision is AFFIRMED. Plaintiff's Complaint is DISMISSED.

IT IS SO ORDERED.

DATED this 15 day of December 2000.

/s/ Ann Aiken
Ann Aiken
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

PAMELA ERWIN,	)	
	)	
Plaintiff,	)	Adv. No: 99-6291-fra
vs.	)	Pl. Motion for Partial
	)	Summary Judgment
FEDERAL METALS	)	
CENTRAL C. U.,	)	
	)	
Defendant.	)	

EXCERPT OF PROCEEDINGS
JUDGE'S RULING

BE IT REMEMBERED THAT the above-entitled cause came duly on for hearing in the U.S. Bankruptcy Court, 151 West 7th Avenue, Eugene, Oregon, on April 11th, 2000, at 3:30 p.m., before the Honorable Frank R. Alley, Bankruptcy Judge.

APPEARANCES:

For Plaintiff:

Mr. Gregory Christensen
Attorney at Law
PO Box 2039
Corvallis, OR 97339

For Defendant:

Mr. Harold Scoggins
Attorney at Law
121 SW Meadows Rd.
Lake Oswego, OR 97035

REPORTED BY:
COURTWORKS, INC.
2678 Sharon Way
Eugene, OR 97401-5166
(541) 343-08907

Paula M. Cottrell-Shirey, RPR, CSR

COURT'S RULING

THE COURT: It is interesting, it's worth some time. I have considered the arguments that the parties' counsel have made at today's hearing. I've also reviewed the materials submitted in favor of the two cross motions for summary judgment. I am prepared to rule.

I find that based on the materials presented, there is no dispute as to any material fact and the Court may determine this matter as a matter of law.

And I believe that I must find for the defendant and order that summary judgment be entered in the defendant's favor for the following reasons: Code Section 362 (h), which is the statute this matter is premised on, provides that if an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney fees and in appropriate circumstances, may recover punitive damages.

It's my belief, based on the record before me, that the plaintiff was not and cannot establish that she was damaged because I believe that the funds in question have been since the case was commenced and remain the property of the estate.

I believe this because of my view of the intersection of state law regarding employees and the effect of Bankruptcy Code Section 541. The pay period, it is clear, ended on the 18th day of June.

I think Mr. Christensen acknowledges that at that time, there arose a right of the debtor to receive compensation for the work she had done in the two weeks up to that date.

What Oregon law provides is once the work is done and the pay period ends, the employee has a right to payment, subject as in this case to a period of time in which the employer may do what's necessary to process the time card, prepare the checks, having made the required deductions and so forth.

In effect, as of the date the petition was filed, the debtor had a right to payment for that time, subject only to the employer's right to defer the actual cutting of the check. What that means is that the filing of the petition transferred just right to the estate.

The check that was subsequently cut was the proceeds of the cause of action which had accrued pre-petition and since it's the proceeds, it is itself property of the estate.

It is not necessary for me to determine whether Oregon follows the continuing levy or the lien theory, because whatever the credit union rights to the funds may be, it's between the credit union and the estate.

The debtor is not damaged because if the lien is defeated, the money is property of the estate. If under a continuing levy theory, it is not; it is property of the credit union.

In no scenario that I can imagine would the debtor herself been entitled to those funds. It follows that if there was a state (sic) violation, she cannot be said to have been damaged by it and she has therefore no standing to bring this action against the credit union.

My remarks from the bench constitute my findings of fact and conclusions of law. I will not set them out separately.

I will authorize entry of an Order awarding summary judgment to the defendant and a final judgment consistent with that order. And I would ask Mr. Scoggins to draft both of those at his earliest convenience, provide them to Mr. Christensen for review, and then see that they are delivered to my chambers.

MR. SCOGGINS: Yes, Your Honor.

THE COURT: That concludes the matter. Thank you all for your time and your significant efforts in this matter. Gentlemen, we're in recess.

(WHEREUPON, the proceedings were concluded at the hour of 4:40 o'clock p.m.)

FILED
JUN 26 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: PAMELA M. ERWIN, Debtor, ---------- PAMELA M. ERWIN, Plaintiff - Appellant, v. FEDERAL METALS CREDIT UNION, Defendant - Appellee.	No: 01-35120 D.C. No. CV-00-06314-AA ORDER

Before: TROTT and T.G. NELSON, Circuit Judges, and SHADUR, * District Judge.

Appellant's petition for rehearing is denied.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

SCHEDULE I -

CURRENT INCOME OF INDIVIDUAL DEBTOR(S)

The column labeled "Spouse" must be completed in all cases filed by joint debtors and by a married debtor in Chapter 12 or 13 case whether or not a joint petition is filed, unless the spouses are separated and a joint petition is not filed.

Debtor's Marital Status Single	DEPENDENTS OF DEBTOR AND SPOUSE		
	NAMES	AGE	RELATIONSHIP

Employment:	**DEBTOR**	**SPOUSE**
Occupation: Dept. Secretary Name of Employer: Good Samaritan Hosp. How Long Employed: 5 yrs. Address of Employer: 3600 NW Samaritan Dr. Corvallis, OR 97330		

	DEBTOR	SPOUSE
Income: (Estimate of average monthly income) Current monthly gross wages salary, and Commissions (pro rate if not paid monthly)	$1,943.49	_____
	_____	_____
Estimated monthly overtime	_____	_____
SUBTOTAL	$1,943.49	_____
LESS PAYROLL DEDUCTIONS	470.00	_____
a. Payroll taxes and Social Security	7.82	_____
b. Insurance	_____	_____
c. Union Dues	_____	_____
d. Other (Specify)		

Pharmacy	32.18	
SUBTOTAL OF PAYROLL DEDUCTIONS	$ 548.20	
TOTAL OF MONTHLY TAKE HOME PAY	$1,395.29	
Regular income from operation of business or Farm (attached detailed statement)	$	
Income from real property		
Interest and dividends		
Alimony, maintenance or support payments payable to the debtor for the debtor's use or that of dependents listed above	$	
Social Security or government assistance		
Specify		
Other monthly income Specify		
TOTAL MONTHLY INCOME	$1,395.29	
TOTAL COMBINED MONTHLY INCOME (Report also on Summary of Schedules)	$1,395.29	

Describe any increase or decrease of more than 10% in any of the above categories anticipated to occur within the year following the filing of the document:

None

UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE

ERWIN, Pamela M.
334-50-9800
1785 Gardner Rd.
Dallas, OR 97338

Case No:_____
DEBTOR(S) Chapter 7

STATEMENT OF FINANCIAL AFFAIRS

* * * * *

---

4. Suits and administrative proceedings, executions, garnishments and attachments

None

☐ a. List all suits and administrative proceedings to which the debtor is or was a party within **one year** immediately preceding the filing of this bankruptcy case. (Married debtors filing under chapter 12 or chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and joint petition is not filed.

CAPTION OF SUIT AND CASE NO.	NATURE OF PROCEEDING	COURT AND LOCATION	STATUS OR DISPOSITION
Federal Metals Credit Union v. Pamela L. Erwin and Debra R. Vine Case No: 99-10137	Civil	Benton County	Continuing Garnishment

* * * * *

5. Repossessions, foreclosures and returns

None

☐ b. List all property that has been attached, garnished or seized under any legal or equitable process within **one year** immediately preceding the commencement of this case. (Married debtors filing under chapter 12 or Chapter 13 must include information concerning either or both spouses whether or not a joint petition is filed, unless the spouses are separated and joint petition is not filed

NAME AND ADDRESS OF CREDITOR OR SELLER	DATE OF REPOSESSION FORECLOSURE SALE OF PROPERTY TRANSFER OR RETURN	DESCRIPTION OF PROPERTY
Federal Metals Credit Union $6,000 PO Box D Albany, OR 97321	4/99	1989 GMC Pickup Truck

* * * * *

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In re:	)	Case No.
	)	699-64318 fra7
PAMEL M. ERWIN,	)	Adv. No: 99-6291-fra
Debtor	)	
	)	
PAMEL M. ERWIN,	)	FIRST AMENDED
Plaintiff,	)	COMPLAINT
vs.	)	
FEDERAL METALS	)	
CREDIT C.U.,	)	
Defendant.	)	

Plaintiff alleges:

1. This is an adversary proceeding under Bankruptcy Rule 7001 in which Plaintiff seeks damages for violation of the automatic stay by defendant pursuant to 11 U.S.C. § 362(a).

2. This Court has jurisdiction over this core proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(I).

3. Plaintiff is the debtor in this chapter 7 case.

4. Defendant is a Federal Credit Union.

5. On June 23, 1999, defendant credit union served a Writ of Continuing Garnishment on the plaintiff's employer. Previously, defendant had obtained judgment against plaintiff for a deficiency balance remaining after repossession of an automobile.

6. On July 20, 1999, debtor-plaintiff filed this chapter 7 bankruptcy case.

7. On July 21, 1999, plaintiff through her attorney faxed and mailed a letter to defendant's legal counsel informing defendant credit union to withdraw its garnishment order in compliance with the automatic stay of the United States Bankruptcy Code §362(a)(2) - (6).

8. Defendant credit union refused to withdraw its garnishment on plaintiff's wages.

9. On or about July 23, 1999, in a knowing and willful violation of the automatic stay, the credit union seized plaintiff's wages in the sum of $330.73.

10. In spite of repeated demands by plaintiff for the return of her wages, defendant credit union has refused and continues to refuse to return funds belonging to the plaintiff, but seized those funds and deposited them into defendant credit union's own account.

11. Defendant credit union at no time during plaintiff's chapter 7 case applied for relief from the automatic stay.

12. Defendant credit union should be held in contempt for an intentional, knowing and willful violation of the automatic stay.

13. Plaintiff should be awarded compensatory damages of $330.73 for this violation, plus interest thereon since the date of seizure, plus her costs and attorney fees incurred in prosecuting this proceeding.

14. Plaintiff should be awarded punitive damages in the sum of $10,000.00, because the defendant is a federally-chartered financial institution with substantial resources and assets, whose violation of the automatic stay was intentional, willful, knowing, and without excuse. Defendant credt unions' actions were calculated to wrongfully seize a debtor's wages in an amount apparently so small that the debtor would not complain. Such conduct is reprehensible and should be punished.

WHEREFORE, plaintiff prays that:

1. Defendant credit union be held in contempt for violating the automatic stay willfully and knowingly, plus fined as the court deems appropriate.

2. Plaintiff have judgment against defendant credit union for $330.73 compensatory damages, plus interest; for $10,000.00 in punitive damages; and for her costs and attorney fees.

3. Such other relief as to the court seems fit and just.

/s/Gregory J. Christensen
Gregory J. Christensen, OSB #77139
Attorney for Plaintiff